Supreme Court, U.S.
FILED
FEB 5 2003
OFFICE OF THE CLERK

No. 02-322

IN THE

Supreme Court of the United States

UNITED STATES DEPARTMENT OF JUSTICE,
BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES,
Petitioner,

v.

CITY OF CHICAGO,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF FOR THE RESPONDENT

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QUESTIONS PRESENTED

1. Whether disclosure of individual names and addresses in the multiple sales and firearms trace databases is an unwarranted invasion of personal privacy within the meaning of Exemption 7(C) of the Freedom of Information Act in light of the findings below that disclosure of this information will enable the public to more effectively evaluate whether the federal government is adequately protecting its safety.

2. Whether disclosure of the trace database can reasonably be expected to interfere with law enforcement proceedings within the meaning of Exemption 7(A) of the Freedom of Information Act in light of the findings below that the evidence adduced in support of this claimed exemption rested on unrealistic speculation.

3. Whether the district court committed any clear error in finding that if information in the multiple sales or trace databases identifying individual names, addresses, or firearms is exempt from disclosure under the Freedom of Information Act, components within that information are reasonably segregable through encrypted redaction.

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BRIEF FOR THE RESPONDENT

STATEMENT

1. Under the Gun Control Act, all licensed firearms importers, manufacturers, and dealers must maintain records of their sale or other disposition of firearms. See 18 U.S.C. § 923(g)(1)(A) (2000). In particular, prior to transferring a firearm at retail, a licensee must record on a prescribed form the transferee's name, address, date and place of birth, height, weight, and race, and identify the firearm transferred by manufacturer, model, and serial number. See 27 C.F.R. § 178.124 (2002). During either a criminal investigation of any person other than the licensee or an annual compliance inspection of the licensee, the Secretary of the Treasury is entitled to inspect these records without a warrant or cause to believe that the licensee has violated the law. See 18 U.S.C. § 923(g)(1) (2000). Moreover, licensees must provide the

Secretary within 24 hours of a request any "information contained in the records required to be kept . . . for determining the disposition of 1 or more firearms in the course of a bona fide criminal investigation." *Id.* § 923(g)(7). In addition, whenever a licensee transfers two or more handguns to a nonlicensee within five consecutive business days, the licensee must report the multiple sale to the federal office designated by the Secretary, and to the state and local law enforcement agencies having jurisdiction at the location of the transfers. See *id.* § 923(g)(3)(A).

Utilizing this statutory framework, the United States Bureau of Alcohol, Tobacco and Firearms ("ATF") traces the disposition of firearms by federal licensees at the request of more than 17,000 law enforcement agencies, processing more than 200,000 trace requests annually and reporting the results to the requesting agency. J.A. 24.[1] After a firearm is recovered and a trace is requested by the law enforcement agency conducting the investigation, ATF contacts a firearm's manufacturer, wholesaler, and retailer to trace its disposition. J.A. 22-24. ATF maintains comprehensive databases containing the information generated by firearms traces and reports of multiple sales. *Ibid.*

2. In November 1998, the City of Chicago filed a lawsuit against certain firearms manufacturers, wholesalers, and dealers, alleging that their marketing practices unreasonably facilitate the unlawful possession and use of firearms. Pet. App. 19a-20a. Around the same time, the City submitted a request to ATF under the Freedom of Information Act ("FOIA") seeking disclosure of nationwide data from its multiple sales and trace databases "[i]n an effort to gain

[1] In the Homeland Security Act of 2002, ATF itself, and the related responsibilities of the Secretary of Treasury, were transferred to the Department of Justice and ATF was renamed the Bureau of Alcohol, Tobacco, Firearms and Explosives. See Pub. L. No. 107-296, §§ 1111-12, 116 Stat. 2273-79 (2002).

information regarding nationwide firearm distribution patterns." *Id.* at 20a. ATF denied the request, although it promised to provide the information if the City withdrew its FOIA request and sought the information pursuant to the Gun Control Act. *Id.* at 21a. The City complied, but ATF again failed to provide the requested information. *Ibid.* After several further requests for the information, the City again filed a formal FOIA request on March 3, 2000. *Ibid.* In response, ATF sent the City the zip disk that it uses to respond to all FOIA requests, which failed to contain much of the information sought by the City. R. 8 at 6-16, 18-31. The City then brought suit against ATF under FOIA seeking the withheld information. Pet. App. 22a.

In the ensuing litigation, ATF eventually claimed that, as a matter of policy, it withholds all information in its trace database for one year and all information in its multiple sales database for two years to avoid interference with law enforcement proceedings as provided by FOIA Exemption 7(A), 5 U.S.C. § 552(b)(7)(A) (2000). See Pet. Br. 8, 11. ATF asserted this same exemption to shield for five years all information in the trace database identifying the requesting agency; the serial number of the weapon recovered if it was purchased as part of a multiple sale; the date of all firearm purchases; the location of the weapon's recovery by law enforcement personnel; and names and addresses of the licensees that imported, manufactured, or sold the weapon; the individual who purchased it at retail from a dealer; and the individual who possessed it at the time of its recovery by law enforcement and that individual's known associates present at the time of recovery. J.A. 35-46. ATF claimed a right to withhold indefinitely, under FOIA's Exemptions 6 and 7(C) for disclosures that would constitute an unwarranted invasion of privacy (5 U.S.C. § 552(b)(6), 7(c) (2000)), information disclosing the location of a firearm's recovery; the names and addresses of its possessor and his known

associates at the time of recovery; and the names and addresses of those who bought traced guns from a licensee at retail or who purchased multiple handguns. J.A. 51-57.

3. ATF filed a motion for summary judgment supported by statements of ATF Disclosure Division Chief Dorothy A. Chambers ("Chambers"), ATF Assistant Director for Field Operations David L. Benton ("Benton"), and by letters to ATF from the national president of the Fraternal Order of Police ("FOP") and the chairman of the Law Enforcement Steering Committee urging that data from trace requests be withheld. R. 21. Benton's affidavit identified no studies performed by ATF or others on the possibility of interference. Instead, he described nine hypothetical scenarios that he claimed justified withholding some of the information (see J.A. 26, 28, 35-36, 40, 42-44, 46, 48-49) and provided more general claims for withholding other information (J.A. 25-57). Benton also contended that disclosure of names or addresses would compromise privacy interests by connecting identifiable individuals, or even just addresses without names, to purchases of multiple handguns or criminal investigations without advancing any public interest. J.A. 52-56.

Chicago also moved for summary judgment. R. 24. The City supported its motion with affidavits from Gerald A. Nunziato ("Nunziato"), a former ATF agent who, from 1991 to 1998, was in charge of developing the tracing process and the software to support it as well as supervising all trace requests at ATF's National Tracing Center. J.A. 75-76, 179, 207. Nunziato testified that the trace database reveals nothing about any law enforcement investigation (J.A. 84) and that without access to other nonpublic databases, sophisticated software, and "unique investigative techniques," it would even be impossible to tell which dealers or individuals in the database were likely to be the subjects of pending investigations. J.A. 86-88. He added that during his tenure at ATF, he could not recall any investigations or prosecutions

that were "damaged or adversely affected by the disclosure of information from the [trace database]." J.A. 85. He provided as examples four actual investigations that were not compromised despite the public release under FOIA of the data on these investigations contained in the trace database. J.A. 84-88. Nunziato also explained that ATF utilizes several masking techniques to prevent disclosure of confidential information relating to pending investigations, such as a "do not contact" code, that keep sensitive information out of the portion of the database requested by Chicago. J.A. 89-91. Nunziato further explained that disclosure of the information sought by Chicago could be used to determine whether ATF is effectively performing its duties. J.A. 101-02. The City also submitted affidavits from Harvey Radney, Deputy Superintendent in charge of investigative services for the Chicago Police Department; Lee A. Solomon, Prosecutor of Camden County, New Jersey; Michael Hall, Deputy Chief of the Headquarters Bureau of the Detroit Police Department; and Colonel Edward M. Roth, President of Police Commissioners for the City of St. Louis, all of whom testified that releasing raw ATF data was unlikely to compromise police investigations. J.A. 59-70, 109-11.

4. The district court held a two-day hearing on the cross-motions for summary judgment in order to "hear testimony as to why the withheld information would fall within FOIA Exemption 6 and 7, if the documents requested were redacted . . . and the feasibility of such redaction." J.A. 11-12.[2] ATF

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[2] ATF's claim that the hearing was limited to the question whether the requested databases could be redacted and then improperly broadened over its objections (see Pet. Br. 13 n.10) is accordingly inaccurate. Indeed, ATF itself used the hearing to present evidence on the merits of its claim to FOIA exemptions by defending the withholding of various data elements and did not confine itself to the issue of computerized redactions. See, *e.g.*, R. 76-1 at 18-20, 28-30. In any event, ATF's objections to testimony that went beyond redaction were overruled (*e.g.*,

called three witnesses—Chambers; Gary Foreman ("Foreman"), an ATF computer specialist; and Forest Webb, Chief, National Tracing Center—who testified that ATF's disclosure policies were consistent with FOIA and that it would be difficult for ATF to disclose even redacted data not identifying individual names or addresses. See R. 76-1, 76-2; J.A. 115-77 (excerpts). Chicago called two witnesses, Nunziato and John Van Aken ("Van Aken"), who testified that the requested information could be released without compromising investigations and that redaction of information the court found exempt from disclosure could be easily done through an encryption procedure. See R. 76-2; J.A. 178-246 (excerpts).

5. The district court entered judgment in favor of Chicago. R. 53, 54, 55. The court found that Exemptions 6 and 7(A) did not apply because disclosure would not constitute an unwarranted invasion of privacy and that Exemption 7(A) did not apply because ATF had failed to show how disclosure was likely to interfere with law enforcement proceedings. See Pet. App. 23a-27a. The court also found that information disclosing names, addresses, and weapons in the databases could be redacted through the use of encrypted identifiers without burdening the agency or requiring the creation of new documents if any of this information was deemed exempt from disclosure on appeal. See *id.* at 27a-30a.[3]

6. The court of appeals affirmed. The court acknowledged that any "potential for interference" involving either "open or prospective investigations" would be sufficient to invoke the law enforcement exemption, but held that "ATF has not

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J.A. 124, 135, 160), and it did not seek review of those evidentiary rulings in the court of appeals or this Court.

[3] The district court did not reach the question whether ATF had waived the claimed exemptions by previously releasing information similar to that requested by the City. See Pet. App. 30a. This issue would accordingly remain open on remand if the Court were to reverse the judgment.

affirmatively established any potential interference of this nature." Pet. App. 7a-8a. The court also concluded that disclosure would not be an unwarranted invasion of privacy because "[d]isclosure of the records sought by the City will shed light on ATF's efficiency in performing its duties and directly serve FOIA's purpose in keeping the activities of government agencies open to the sharp eye of public scrutiny." *Id.* at 15a. The court's discussion of the law enforcement exemption was modified, on ATF's petition for rehearing, to explain that "ATF has provided us with only far-fetched hypothetical scenarios; without a more substantial, realistic risk of interference, we cannot allow ATF to rely on this FOIA exemption to withhold these requested records." *Id.* at 18a.

SUMMARY OF ARGUMENT

ATF relies on FOIA's privacy exemption to prevent disclosure of the identities of those who have bought multiple handguns or bought or possessed traced firearms, but the privacy interests at stake here are limited. Those who buy or sell firearms engage in commercial transactions in a highly regulated industry. Their transactions are subject to intensive regulatory scrutiny, and none of the persons with whom they deal is under any obligation of confidentiality. Multiple handgun purchases in particular cannot fairly be characterized as private, since they must be reported to ATF, and neither ATF nor the dealer that sold the firearms is under any obligation to treat the purchase as confidential. Nor is there a substantial privacy interest in traced weapons. By the time a firearm is traced, it has been recovered by the authorities, and its prior possessors cannot fairly claim to have any meaningful privacy interest in a firearm after it has been given or sold to someone else, abandoned, or seized by the authorities. In any event, disclosure of this information is fully "warranted" within the meaning of FOIA's Exemption 7(C). Disclosure of unredacted information can enable the public to

better assess whether the federal government is making fully effective use of this data to combat firearms crime, and surely the disclosure of information that bears on the public's safety is "warranted" within the meaning of Exemption 7(C) absent some extraordinary invasion of privacy interests.

ATF also relies on FOIA's law enforcement exemption to shield most of its trace database, but the district court correctly rejected its claim to this exemption. Most of the information in this database is neither confidential nor sensitive; for the most part, the database contains only information already known to the subjects of an investigation. FOIA does not permit an agency to adopt a blanket policy of nondisclosure of a category of information that is generally nonsensitive. The kind of categorical exemption from disclosure utilized by ATF is improper; it does not identify the types of traces likely to compromise investigations if disclosed (indeed Chicago has not sought disclosure of such data) or traces considered sensitive by the law enforcement agency actually conducting the investigation.

Finally, to the extent ATF persuades the Court that identifying information about individual names, addresses, or weapons should not be disclosed, these data elements can readily be encrypted for release through the redaction procedure endorsed by the district court.

ARGUMENT

As this Court has explained, FOIA "'is broadly conceived,'" and "its 'basic policy' is in favor of disclosure." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 220 (1978) (quoting *EPA v. Mink*, 410 U.S. 73, 80 (1973), and *Department of Air Force v. Rose*, 425 U.S. 352, 361 (1976)). Accord, *e.g.*, *Department of Interior v. Klamath Water Users Protective Association*, 532 U.S. 1, 7-8 (2001); *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 151-52 (1989). For that reason, this Court "ha[s] consistently stated that FOIA

exemptions are to be narrowly construed." *United States Department of Justice v. Julian*, 486 U.S. 1, 8 (1988) (citations omitted). Accord, *e.g.*, *Klamath Water Users*, 532 U.S. at 8; *John Doe Agency*, 493 U.S. at 162; *Rose*, 425 U.S. at 361.

FOIA provides that in an action under the statute, "the court shall determine the matter de novo" and that "the burden is on the agency to sustain its action." 5 U.S.C. § 552(a)(4)(B) (2000). In this case, the district court held a hearing to weigh the conflicting evidence that the parties adduced on the impact of disclosure on both privacy and law enforcement. The district court found that disclosure of the information at issue here neither constitutes an unwarranted invasion of privacy within the meaning of FOIA's privacy exemption nor could reasonably be expected to interfere with law enforcement proceedings within the meaning of FOIA's law enforcement exemption. That judgment, reflecting as it does the district court's findings on numerous disputed issues of fact, is entitled to respectful deference, since "[f]indings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of witnesses." Fed. R. Civ. P. 52(a). To be sure, in this case the district court purported to grant the City summary judgment rather than make findings after trial (see Pet. App 19a), but that is, at most, an error of form and not substance. The court heard all the evidence that the parties wished to offer, which amounted to a substantial volume of oral testimony and documentary material.[4] The district court

[4] ATF notes that Benton did not appear at the hearing (see Pet. Br. 13-14 n.10), but that was ATF's own decision. As we explain above, ATF was well aware of the scope of the hearing, yet it chose to adduce Benton's testimony by affidavit instead of live testimony, and ATF has not sought review of the district court's ruling on the scope of the hearing. In any event, the district court carefully considered Benton's written testimony when reaching its decision. See Pet. App. 25a-27a.

then made findings based on that evidence. Even ATF does not argue that this case should be remanded for trial; a trial has already been held and the parties' evidence has been evaluated. The district court's labeling of its opinion as granting summary judgment rather than making findings of fact was, at worst, a harmless error not affecting the substantial rights of the parties. See 28 U.S.C. § 2111 (2000).[5]

ATF claims that "the district court's decision did not rest on the resolution of disputed factual issues . . . ." Pet. Br. 13 n.10. This assertion is belied by the record. To decide the

[5] Findings of a district court made when ruling on a motion for summary judgment are frequently reviewed deferentially on appeal in FOIA litigation, since the summary judgment record will often contain all the evidence that the parties wish the court to consider, making a trial pointless. See, *e.g.*, *Solar Sources, Inc. v. United States*, 142 F.3d 1033, 1038 n.5 (7th Cir. 1998); *Summers v. Department of Justice*, 140 F.3d 1077, 1080 (D.C. Cir. 1998). Indeed, many circuits utilize deferential review in FOIA litigation in appeals from rulings granting summary judgment. See, *e.g.*, *Klamath Water Users Protective Association v. Department of Interior*, 189 F.3d 1034, 1036 (9th Cir. 1999), aff'd, 532 U.S. 1 (2001); *Solar Sources*, 142 F.3d at 1038 & n.5; *Sheet Metal Workers International, Local Union No. 19 v. United States Department of Veterans Affairs*, 135 F.3d 891, 896 (3d Cir. 1998); *Miscavige v. IRS*, 2 F.3d 366, 367 (11th Cir. 1993); *Spannaus v. United States Department of Justice*, 813 F.2d 1285, 1288 (4th Cir. 1987). The Second Circuit, which employs a de novo standard of review, does so in part because that keeps courts "from issuing a meaningless judicial imprimatur on agency discretion." *Halpern v. FBI*, 181 F.3d 279, 288 (2d Cir. 1999). And the D.C. Circuit, while also using a de novo standard, does so because summary judgment includes the substantive evidentiary burden, which, under FOIA, is placed on the agency to show that the requested material falls within a FOIA exemption. See *Petroleum Information Corp. v. Department of Interior*, 976 F.2d 1429, 1433 (D.C. Cir. 1992). It is unnecessary in this case to address the conflict in the circuits on the scope of appellate review of a district court's findings in a FOIA case in which there has been no trial, however, not only because ATF has not sought review on this issue, but because in this case there actually was a trial, as we explain above.

case before it, the district court weighed conflicting evidence; the witnesses were sharply divided on virtually all the critical issues, such as whether disclosure of the requested information would enhance public understanding of ATF's operations or interfere with law enforcement investigations. When, as here, the district court weighs conflicting evidence, its resolution of those conflicts is entitled to deference. See, *e.g.*, *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709 (1986); *Anderson v. City of Bessemer City*, 470 U.S. 564 (1985).[6] Indeed, this Court pays particular deference to the findings of a district court in cases such as this one, in which those findings have already been reviewed and sustained by the court of appeals. See, *e.g.*, *Exxon Co. U.S.A. v. SOFEC, Inc.*, 517 U.S. 830, 840-41 (1996); *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 665 (1987); *Berenyi v. District Director*, 385 U.S. 630, 636 (1967); *Blau v. Lehman*, 368 U.S. 403, 408-09 (1962); *Graver Tank & Manufacturing Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949). With that preface, we turn to the two claims of exemption that ATF still presses.[7]

[6] This point also explains why, even if the district court's decision is thought to involve mixed questions of law and fact, its decision still should be reviewed deferentially. Critical to the determination of the standard for review of findings on mixed questions of law and fact is whether the trial court's ruling is rooted in what are essentially factual determinations. See, *e.g.*, *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 401-02 (1990). That principle is fully applicable to FOIA litigation in which the district court must evaluate the probative weight of proffered evidence. See, *e.g.*, *Summers*, 140 F.3d at 1080 (discussing the difficulty appellate tribunals face when called upon to make factual determinations in FOIA litigation).

[7] ATF has abandoned its claim to FOIA's Exemption 6 for personnel, medical, and similar files the disclosure of which would work a clearly unwarranted invasion of privacy (see Pet. Br. 20 n.11) and to Exemption 7(A) for multiple sales data (see *id.* at 34 n.17).

I. THE NAMES AND ADDRESSES OF FIREARMS PURCHASERS AND POSSESSORS CONTAINED IN THE MULTIPLE SALES AND TRACE DATABASES ARE NOT EXEMPT FROM DISCLOSURE UNDER FOIA EXEMPTION 7(C).

FOIA's Exemption 7(C) is applicable when the release of the requested information "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C) (2000). The disclosure of the names and addresses of firearms purchasers and possessors, their known associates present when a firearm was recovered by the authorities, and the location of the recovery is fully "warranted" within the meaning of Exemption 7(C).

A. Disclosure Of Individual Names And Addresses In The Multiple Sales And Trace Databases Would Implicate Only Limited Privacy Interests.

This Court has firmly rejected the view that under FOIA, "disclosure of a list of names and other identifying information is inherently and always a significant threat to the privacy of the individuals on the list." *United States Department of State v. Ray*, 502 U.S. 164, 176 n.12 (1991).[8] Accordingly, we begin with an assessment of the magnitude of the privacy interests at stake in this case.

[8] Congress has itself recognized that FOIA disclosure should not be defeated simply because a requestor seeks information about an identifiable individual. The Privacy Act, which ordinarily forbids disclosure of information in agency records about particular individuals, exempts from that prohibition disclosures required by FOIA. See 5 U.S.C. § 552a(t)(1) (2000). See also *United States Department of Justice v. Provenzano*, 469 U.S. 14 (1984) (per curiam).

1. *The Multiple Sales Database*

The multiple sales database reflects the reports of sales of multiple handguns that firearms dealers are required to file with federal, state, and local law enforcement agencies. See 18 U.S.C. § 923(g)(3)(A) (2000); J.A. 32.[9] There are, at most, only marginal privacy interests affected by disclosure of this data.

At the outset, those who buy firearms have at most a limited expectation of privacy with respect to what is a commercial transaction with third parties who are themselves under no obligation to keep that transaction confidential. See, *e.g.*, *California v. Greenwood*, 486 U.S. 35, 41 (1988) (holding that individuals have no reasonable expectation of privacy in refuse placed outside their homes for disposal because "a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties"). In *United States v. Miller*, 425 U.S. 435 (1976), for example, this Court held that there was no constitutionally protected privacy interest in bank records sought by law enforcement officials, since they contain "information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed." *Id.* at 443.[10] The same

[9] ATF acknowledges that it withholds all information in the multiple sales database for two years. See Pet. Br. 11. Yet ATF no longer claims a FOIA exemption for anything other than individual names and addresses in this database. See *id.* at 22-25, 34 n.17. Thus, ATF appears to concede that its blanket policy of withholding all multiple sales data for two years is indefensible.

[10] To be sure, these constitutional precedents are not controlling here, since the scope of Exemption 7(C) is not identical to the protection offered privacy interests by the Constitution. See *United States Department of Justice v. Reporters Committee for Freedom of the Press*, 489

is true for firearms purchasers; they have no guarantee that dealers will treat their transactions as private. In particular, dealers are free to disclose their customer lists to anyone who seeks them for commercial or other purposes. Cf. *United States Department of Defense v. FLRA*, 510 U.S. 487, 501 (1994) (recognizing that lists of names and addresses are frequently exploited for commercial purposes).

Equally important, the purchase of a firearm is subject to intensive regulatory scrutiny. Firearms are one of the few commodities that cannot be purchased anonymously, at least from a licensed dealer. Instead, as we explain above, federal law requires purchasers to supply identifying information to licensed dealers. Thus, the privacy interests associated with the purchases reflected in both the multiple sales and trace databases are far more limited than the privacy interests at stake in nearly all other commercial transactions.

Moreover, as we also explain above, not only must dealers record the identities of all firearms purchasers, but these records are subject to warrantless inspection by the Secretary during annual compliance inspections and in the course of any other investigation he may perform, regardless of whether it is targeted at the particular purchaser whose records are scrutinized. While most business property is considered sufficiently private that warrantless inspection is prohibited by the Fourth Amendment (see, *e.g.*, *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978)), that is not true for those who deal in firearms. In *United States v. Biswell*, 406 U.S. 311 (1972), the Court upheld the Gun Control Act's regime of warrantless inspection, observing that "close scrutiny of this traffic is undeniably of central importance to federal efforts to prevent violent crime and to assist the States in

U.S. 749, 762 n.13 (1989). But the reasoning of precedents that address the scope of constitutionally protected privacy interests usefully informs analysis under Exemption 7(C). See *id.* at 762-63.

regulating the firearms traffic within their borders." *Id.* at 315. The Court added, "[w]hen a dealer chooses to engage in this pervasively regulated business and to accept a federal license, he does so with the knowledge that his business records . . . will be subject to effective inspection." *Id.* at 316.[11] This intensive regulatory scrutiny diminishes purchasers' as well as dealers' expectations of privacy; purchasers no less than dealers make their transactions in a closely regulated industry. It follows that firearms purchasers lack a reasonable expectation of privacy in these commercial transactions. See, *e.g.*, *United States v. Marchant*, 55 F.3d 509, 516 (10th Cir.), cert. denied, 516 U.S. 901 (1995); *Center to Prevent Handgun Violence v. United States Department of Treasury*, 981 F. Supp. 20, 23 (D.D.C. 1997).

Purchasers of multiple handguns, in particular, lack substantial privacy interests since they are on notice that all multiple purchases must be reported to both ATF and to state and local authorities having jurisdiction at the point of sale. See 18 U.S.C. § 923(g)(3)(A) (2000). And although state and local officials are prohibited from disclosing the contents of multiple sales reports and must destroy the records within 20 days, this prohibition does not apply to the federal government. See *id.* § 923(g)(3)(B). Thus, Congress was unwilling to grant multiple purchasers any assurance of confidentiality with respect to the very database at issue in this case—multiple purchase data in the hands of ATF. Nor has ATF offered firearms purchasers its own promise of confidentiality; ATF acknowledges that, without placing Chicago under any confidentiality restrictions, it has released "a substantial volume of unredacted data pertaining to firearms crimes and multiple purchasers in Chicago, as a

[11] Since *Biswell*, regulation has become even more intensive; now appropriate federal, state, or local authorities must review firearm purchases from licensed dealers before they occur. See 18 U.S.C. § 922(s) & (t) (2000).

discretionary release to local law enforcement . . . ." Pet. Br. 21 n.12. The record also indicates that ATF has granted journalists and members of the public access to substantial quantities of unredacted multiple sales and trace data. See J.A. 76-79, 95-101, 107-08, R. 25, Exh. G.

Indeed, Congress's unwillingness to place ATF under the obligation of confidentiality imposed on state and local officials who receive multiple sales reports powerfully suggests that Congress was unwilling to treat this information as nondiscloseable under FOIA. Congress could have exempted multiple sales records from disclosure under FOIA by the simple expedient of prohibiting ATF from releasing that information. See 5 U.S.C. § 552(b)(3) (2000) (exempting from disclosure under FOIA information "specifically exempted from disclosure by statute").[12] At a minimum, given Congress's decision not to prohibit release of information by ATF, there is no basis for ATF's view that "Congress regarded multiple purchasers of firearms as having a substantial privacy interest in avoiding disclosure of their identities." Pet. Br. 25. Instead, Congress left the issue of release to be determined by the usual FOIA standards.[13]

ATF argues that information that must be reported to the authorities is nevertheless considered private within the

[12] Amicus National Rifle Association ("NRA") observes that Congress has authorized the Secretary to disseminate only limited types of information about firearms purchases. See NRA Br. 11-20. None of the legislation to which the NRA refers, however, prohibits the release of information to the public; instead it merely authorizes certain releases without prohibiting anything.

[13] This does not make the prohibition on disclosure by state and local governments "wholly pointless" (Pet Br. 25); to the contrary, it ensures that this information is subject to ATF's own disclosure policies as reviewed under the federal FOIA, rather than being governed by the disclosure policies of state and local law enforcement agencies or the decisions of state courts construing state FOIA laws.

meaning of Exemption 7(C), relying nearly exclusively on the decision in *United States Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989), in which this Court held that criminal history information fell within Exemption 7(C). See Pet. Br. 23. In that case, however, there was a "web of federal statutory and regulatory provisions that limits the disclosure of rap-sheet information." 489 U.S. at 764-65. Similarly, in *Whalen v. Roe*, 429 U.S. 589 (1977), which the Court cited in *Reporters Committee* to illuminate the character of protected privacy interests (see 489 U.S. at 762), the state statute at issue provided that the identities of patients for whom certain medications had been prescribed would be kept confidential. See 429 U.S. at 593-95. There are, however, no similar restrictions on ATF with respect to either multiple sales or trace data. That fact should be highly relevant to an assessment of the privacy interests at stake here. After all, privacy interests are not binary but fall on a continuum. Accordingly, the fact that information must be disclosed to the authorities, who are in turn free to disseminate that information to the public at large, surely limits the extent of the privacy interest at stake here.

Claims of privacy also depend on "the characteristic(s) revealed by virtue of being on the particular list, and the consequences likely to ensue." *Ray*, 502 U.S. at 176 n.12 (quoting *National Association of Retired Federal Employees v. Horner*, 879 F.2d 873, 877 (D.C. Cir. 1989), cert. denied, 494 U.S. 1078 (1990)). Here, the information at stake is highly limited. Disclosure of the identities of multiple handgun purchasers reveals no more than that a particular individual engaged in an entirely lawful transaction, albeit one that the purchaser himself had notice was subject to special scrutiny. Unlike the disclosure of a "rap sheet" in *Reporters Committee*, in this case the only information revealed is the decision to engage in lawful, if closely regulated, activity.

2. *The Trace Database*

ATF defends under Exemption 7(C) its withholding of the names and addresses of purchasers of traced firearms, those in possession of traced firearms at the time they are recovered, their known associates present at the scene of recovery, and the recovery location. See Pet. Br. 10. The trace database, however, contains only information related to firearms that have been recovered by the authorities in a bona fide criminal investigation. For that reason, the disclosure of this information has at most a minimal impact on privacy interests.

As we explain above, those who purchase firearms lack substantial privacy interests in the fact of purchase. They engage in a commercial transaction in a closely regulated industry that neither the buyer nor the seller is obligated to treat as confidential. Moreover, the data at issue here does not reflect all purchases of firearms, but only purchases of firearms that subsequently are traced. And traced firearms have been seized by the authorities as part of a criminal investigation. All of the firearms owners whose identity would be disclosed by release of trace data, accordingly, have surrendered any meaningful privacy interest in the fact of their possession of the firearm—they have either sold or given the firearm to a third party, lost or abandoned it, or watched it being seized by the authorities. What is more, trace results are disclosed to the law enforcement agency that requested the trace, and Congress has placed no legal restriction on the ability of those agencies to disclose trace results publicly.[14]

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[14] ATF observes that the Gun Control Act forbids a national system of firearms registration, apparently suggesting that all firearms purchasers except those who buy multiple handguns have some legitimate expectation that their transactions will not be reported to the government. See Pet. Br. 26. The NRA makes a similar point, relying on appropriation legislation prohibiting a national registry and legislation forbidding the disclosure of information relating to background checks performed with respect to firearms purchases. See NRA Br. 20-25. The trace data at issue here, however, is not subject to these statutory restrictions because it is neither a national registry of firearms purchases nor information concerning background checks. Trace data, as we explain above, involves only firearms that are seized during a bona fide criminal investigation, and ATF is specifically authorized to collect trace data for such firearms. See 18 U.S.C. § 923(g)(7) (2000).

Thus, after a firearm is recovered in the course of a criminal investigation, not only have the firearm's prior owners lost physical control of the firearm itself, but they also have lost control over the extent to which information about their prior possession of the firearm will be made part of the public record. Indeed, those who have purchased or possessed a traced firearm, or who were with the possessor when it was recovered by the authorities, must necessarily expect that the circumstances surrounding a traced firearm's purchase and recovery by the authorities may well be disclosed in the course of subsequent law enforcement proceedings. A useful analogy is provided by *United States Department of Justice v. Landano*, 508 U.S. 165 (1993). In that case, this Court rejected an assertion of FOIA's Exemption 7(D), which exempts from disclosure information that would reveal the identity of a confidential source, to shield release of the identities of persons who had provided information to the FBI in connection with a criminal investigation, because it was unrealistic to presume that the identity of all those who provide information to the FBI will remain confidential as its investigation proceeds. See *id.* at 175-76. Here, it is equally unrealistic to presume that trace results obtained by a law enforcement agency will remain confidential. The authorities are free to make whatever use of the trace data they find appropriate in the course of their investigation and any subsequent prosecution. Indeed, ATF itself urges local police to trace firearms precisely because traces are likely to produce information that will be useful in

subsequent investigations and prosecutions. See, *e.g.*, Bureau of Alcohol, Tobacco & Firearms, U.S. Dep't of Treasury, *Crime Gun Trace Reports (2000): National Report* 1-2, 63-66 (July 2002) [hereafter "*Crime Gun Trace Reports*"]; Bureau of Alcohol, Tobacco & Firearms, U.S. Dep't of Treasury, *Commerce in Firearms in the United States* 20 (Feb. 2000) [hereafter "*Commerce in Firearms*"].

The consequences likely to ensue from disclosure of the names and addresses in trace data are minimal as well, given that trace data discloses limited information. Trace data discloses only the identity of the purchaser of a traced firearm, its possessor when it was recovered by the authorities, the possessor's known associates at that time, and the location of recovery. This information provides no indication that any of these individuals did anything wrong or is actually involved in the investigation as a subject, witness, or otherwise. Indeed, ATF admits that traces do not differentiate between wrongdoers and innocent parties. See Pet. Br. 27. Traces also do not disclose the subject or targets of the investigation, or the names of witnesses who have supplied information to the authorities. The disclosure of the address at which a firearm was recovered, similarly, does not disclose wrongdoing by any party, and this discrete geographic fact is not likely to be stigmatizing in any meaningful sense except in the most unusual of circumstances. In any event, one of the risks inherent in the purchase or possession of a firearm is that this information may one day be publicly disclosed if the weapon is later used in connection with a crime. Indeed, purchasers and possessors of firearms are put on notice of that risk by the Gun Control Act itself, which provides for the acquisition of trace information by ATF and permits its disclosure to investigators, while placing no limitations on the dissemination of trace results by either ATF or the law enforcement agency that receives the trace results.

ATF relies on cases holding that records reflecting the nature of an individual's involvement in a criminal investigation, such as those reflecting an individual's arrest record or involvement in investigations as a witness or interviewee, can be considered private within the meaning of Exemption 7(C). See Pet. Br. 25-26. But the information in the trace database is not that specific. Although it identifies people who purchased at retail, or who either possessed a gun when it was recovered by the authorities or were present for the recovery, it does not indicate whether that person is a suspect, a witness, or even interviewed in connection with an investigation. Disclosure could, at most, encourage some to speculate about how an individual identified in the data may have been involved in the criminal process (see *id.* at 27; J.A. 52-56), but the possibility of that type of speculation does not constitute an invasion of privacy. See, *e.g.*, *Rose*, 425 U.S. at 380 n.19 (threat to privacy must be "more palpable than mere possibilities"); *Arieff v. United States Department of Navy*, 712 F.2d 1462, 1468 (D.C. Cir. 1983) (document itself and not speculation must constitute invasion of privacy).[15]

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[15] Indeed, a careful review of the cases on which ATF relies shows that they involve disclosures of far more sensitive information than is at issue here. These cases involve information that, if disclosed, would identify (1) a person named as a suspect, witness, or interviewee in a particular law enforcement investigation, see, *e.g.*, *Reporters Committee*, 489 U.S. at 776-78; *Neely v. FBI*, 208 F.3d 461, 463-65 (4th Cir. 2000); *Manna v. Department of Justice*, 51 F.3d 1158, 1166 (3d Cir.), cert. denied, 516 U.S. 975 1995); *Landano v. United States Department of Justice*, 956 F.2d 422, 426 (3d Cir. 1992), aff'd in part and rev'd in part on other grounds, 508 U.S. 165 (1993); *Burge v. Eastburn*, 934 F.2d 577, 579 (5th Cir. 1991); *Safecard Services, Inc. v. SEC*, 926 F.2d 1197, 1205 (D.C. Cir. 1991); *Fitzgibbon v. CIA*, 911 F.2d 755, 767 (D.C. Cir. 1990); *Senate of Puerto Rico v. United States Department of Justice*, 823 F.2d 574, 588 (D.C. Cir. 1987); (2) some additional, potentially embarrassing information about the person named, see *Ray*, 502 U.S. at 176 (names and addresses disclosing individuals who have cooperated with immigration investigations and additional information about individual immigration histories); *Halloran v. Veterans Administration*, 874 F.2d 315, 321 (5th Cir. 1989) (names connected with private comments on work, job performance, co-workers, clients, and friends); or (3) some other type of

In any event, in the cases cited by ATF, no significant public interest was present to counterbalance the privacy interest at stake. For example, in *Reporters Committee*, the Court concluded that disclosure of the criminal history of a particular individual would not enable the requester "to discover anything about the conduct of the agency that has possession of the requested records." 489 U.S. at 773. Disclosure therefore would not be "warranted" within the meaning of Exemption 7(C) because it would not advance "the citizens' right to be informed about 'what their government is up to.'" *Ibid.* Accordingly, when individuals seek records that may assist them in their own affairs, but which are unlikely to advance any public interests, even a minimal privacy interest should defeat disclosure. As the court explained in *Manna v. Department of Justice*, 51 F.3d 1158 (3d Cir.), cert. denied, 516 U.S. 975 (1995), in which an individual sought disclosure of the identities of witnesses interviewed during the investigation that led to his conviction, "we 'need not linger over the balance' because 'something . . . outweighs nothing every time.'" *Id.* at 1166 (quoting *National Association of Retired Federal Employees*, 879 F.2d at 879). See also, *e.g.*, *Bibles v. Oregon Natural Desert Association*, 519 U.S. 355, 356 (1997) (per curiam) (disclosure of agency's mailing list); *Department of Defense*, 510

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personal information that could lead to unwelcome intrusions on the lives of the individuals whose names and addresses would be disclosed, such as junk mail and other solicitations, see, *e.g.*, *Bibles v. Oregon Natural Desert Association*, 519 U.S. 355 (1997) (per curiam) (department's mailing list); *Department of Defense*, 510 U.S. at 500 (home addresses, but not names, of federal employees who have not disclosed their addresses to their union); *FLRA v. United States Department of Defense*, 977 F.2d 545, 549 (11th Cir. 1992) (home addresses coupled with federal employment positions); *United States Department of Navy v. FLRA*, 975 F.2d 348, 353 (7th Cir. 1992) (names and addresses coupled with federal employment positions); *National Association of Retired Federal Employees*, 879 F.2d at 876 (names and addresses coupled with identification as retired or disabled persons receiving monthly federal annuity checks).

U.S. at 500 (disclosure of home addresses of department's employees). In this case, however, the lower courts properly found that powerful public interests weigh in favor of disclosure, as we now explain.

B. Release Of Individual Names And Addresses Contained In The Multiple Sales And Trace Databases Is Warranted Within The Meaning of Exemption 7(C).

To determine whether a disclosure is "warranted" within the meaning of Exemption 7(C), "a court must balance the public interest in disclosure against the [privacy] interest Congress intended the Exemption to protect." *Reporters Committee*, 489 U.S. at 776. Accord, *e.g.*, *Department of Defense*, 510 U.S. at 497; *Rose*, 425 U.S. at 372. This inquiry requires consideration of the extent to which disclosure of the requested information would "shed[] light on an agency's performance of its statutory duties . . . ." *Reporters Committee*, 489 U.S. at 773. Accord, *e.g.*, *Department of Defense*, 510 U.S. at 497. Here, there is a substantial public interest in the disclosure of unredacted trace and multiple sales data.

Disclosure of unredacted trace data would give the public invaluable tools for assessing how ATF discharges its statutory responsibilities. As ATF acknowledges, it is responsible for the enforcement of federal firearm laws, including the Gun Control Act. See Pet. Br. 4. ATF also acknowledges that analysis of tracing data assists it in that mission, by enabling it to identify patterns of possible illegal firearms trafficking that warrant investigation. See *id.* at 7-8. Independent scholars agree that analysis of this data provides an important tool for evaluating investigative techniques and gun control policy. See, *e.g.*, Philip J. Cook & Anthony A. Braga, *Comprehensive Firearms Tracing: Strategic and Investigative Uses of New Data on Firearms Markets*, 43 Ariz. L. Rev. 277 (2001). ATF even publishes its own

analyses of trace data, which it believes helps to identify patterns of illegal firearms trafficking. See, *e.g.*, *Crime Gun Trace Reports, supra* at 1-2; *Commerce in Firearms, supra* at 2, 22-25; Bureau of Alcohol, Tobacco & Firearms, U.S. Dep't of Treasury, *Youth Crime Gun Interdiction Initiative, Crime Gun Trace Reports: The Illegal Youth Firearms Market in 27 Communities* 12 (Feb. 1999) [hereafter "*Youth Crime Gun*"]. See also Pet. Br. 30 n.14. Neverthless, ATF refuses to disclose unredacted information identifying purchasers and possessors that would allow the public to make an independent evaluation of ATF's use of the data, such as an examination of the frequency with which ATF targets for investigation persons who are ultimately convicted of firearms crimes. Local police departments, in particular, can readily undertake such an analysis through their access to criminal history information. Such an analysis of trace data may well disclose that ATF frequently fails to use trace data effectively to target for investigation persons who display important indicia of illegal firearms trafficking and who are only later investigated and prosecuted by other law enforcement agencies. Without unredacted data, the public cannot evaluate whether ATF is utilizing trace data as effectively as it could.

The public interest in disclosure is equally urgent for multiple sales data. If unredacted data identifying multiple purchasers were disclosed, the public could assess the rate at which multiple purchasers are subsequently prosecuted or provide firearms to others that are later used in crimes. Disclosure of unredacted data will also enable the public to determine if ATF should be making greater use of the data to identify important indicia of illegal firearms trafficking—an inquiry that is impossible to undertake if the public does not know who the multiple purchasers are and therefore cannot determine the rate at which they become involved in illegal firearms trafficking or other criminal activity. Without unredacted data, no one can perform an independent analysis

of multiple sales data to determine if there are patterns of gun law violations that ATF has failed to identify, investigate, or prosecute.

ATF nevertheless claims that "[r]elease of the names and addresses themselves could not assist the public in any appreciable way to determine whether ATF has adequately supported local authorities, or otherwise to evaluate the agency's performance of its responsibilities." Pet. Br. 31-32. The record precludes this assertion. Nunziato, in uncontroverted testimony, explained that if individual names are identified, analysis of multiple sales and trace data can assist the public in determining whether ATF is properly identifying dealers and individuals who display indicia of involvement in illegal gun trafficking, and who therefore warrant further scrutiny. See J.A. 101-02.[16] And as we explain above, it is plain that analysis of unredacted data will shed considerable light on whether ATF is making the best possible use of the information available to it. The district court specifically found that disclosure of this data would advance "the general public interest in facilitating the analysis of gun trafficking patterns nationwide." Pet. App. 24a. The court of appeals

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[16] ATF contends that Nunziato did not explain "*how* the names and addresses of purchasers and third parties in the Trace and Multiple Sales Databases could be used to evaluate ATF's enforcement of federal gun laws." Pet. Br. 31 n.15 (emphasis in original). But a review of his testimony makes plain that Nunziato fully supported our submission that unredacted data will aid the public in assessing ATF's performance. See, *e.g.*, J.A. 101-02. Independent research in the record also questions whether ATF is effectively identifying investigative targets. J.A. 71-74. ATF also suggests that gun recovery addresses are exempt from FOIA because they will not contribute to an understanding of the workings of ATF. See Pet. Br. 32. To the contrary, recovery locations help to identify patterns of firearms trafficking, by revealing the geographic relationship between the place where a firearm was sold and the location where it was recovered. ATF does not dispute that charting the geographic flow of firearms used in crime is a useful method of analyzing trace data.

upheld that finding, concluding that "[d]isclosure of the records sought by the City will shed light on ATF's efficiency in performing its duties and directly serve FOIA's purpose in keeping the activities of public agencies open to the sharp eye of public scrutiny." *Id.* at 15a. These findings are not clearly erroneous. Indeed, requiring the public to be content with only the data an agency is willing to publish about its operations, rather than disclosing information that will enable the public to reach a fully informed and independent assessment of agency performance, is utterly at odds with the purposes of FOIA.[17]

ATF also asserts that the lower courts erred by ascribing significance to Chicago's interest in obtaining this data in order to improve its enforcement of its own gun control laws through civil litigation. See Pet. Br. 28-29 & n.13. But while "the identity of the requesting party has no bearing on the merits of his or her FOIA request," the inquiry under Exemption 7(C) does "turn on the nature of the requested document and its relationship to 'the basic purpose of the Freedom of Information Act to open agency action to the light of public scrutiny . . . .'" *Reporters Committee*, 489 U.S. at 772 (quoting *Rose*, 425 U.S. at 372). Moreover, as we explain above, FOIA properly considers whether a disclosure would "shed[] light on an agency's performance of its

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[17] Indeed, at least one scholar has questioned the basis for ATF's disclosure practices:

> Agency capture interferes with regulation of the gun industry. For example, decades of criticism by the gun industry and the NRA have made the Bureau of Alcohol, Tobacco and Firearms . . . reluctant to publish information unfavorable to gun manufacturers. Instead, the agency's criticisms have been limited to irresponsible dealers.

Timothy D. Lytton, *Lawsuits Against the Gun Industry: A Comparative Institutional Analysis*, 32 Conn. L. Rev. 1247, 1253 (2000) (footnotes omitted).

statutory duties . . . ." *Id.* at 773. And disclosure of information that can aid state and local governments in enforcing applicable firearms laws, whether through civil or criminal litigation, enable the public to hold ATF to its own statutory mission.

One of the purposes of the Gun Control Act "is to provide support to Federal, State, and local law enforcement officials in their fight against firearms crime . . . ." Pub. L. No. 90-618, tit. I, § 101, 82 Stat. 1213 (1968). Similarly, in the Omnibus Crime Control and Safe Streets Act, Congress identified as one of the purposes of federal licensing of firearms dealers that "effective State and local regulation of [firearms] traffic be made possible." Pub. L. No. 90-251, tit. IV, § 901(a)(3), 82 Stat. 225 (1968). ATF acknowledges that one of its "critical missions" is "assisting State and local law enforcement agencies in enforcing their own firearms laws . . . ." *Youth Crime Gun, supra* at vii. Indeed, as we explain in Part I.A.2 above, ATF urges local law enforcement agencies to utilize gun tracing in order to enhance the efficacy of their own investigations of firearms crime.

Given ATF's responsibility to aid local law enforcement efforts, its refusal to provide information that may enable local governments to enforce state and local firearms laws raises a serious question about whether ATF is shirking one of its primary statutory duties. Public nuisance litigation like the case Chicago has brought seeks to enforce state and local firearms laws by obtaining injunctive relief and damages against those who unreasonably facilitate the violation of those laws. See, *e.g.*, John G. Culhane & Jean Macchiaroli Eggen, *Defining a Proper Role for Public Nuisance Law in Municipal Suits Against Gun Sellers: Beyond Rhetoric and Experience*, 52 S.C. L. Rev. 287 (2001); David Kairys, *The Origin and Development of the Governmental Handgun Cases*, 32 Conn. L. Rev. 1163 (2000); Note, *Developments in the Law—The Paths of Civil Litigation*, 113 Harv. L. Rev. 1752, 1759-83 (2000) [hereafter "*The Paths of Civil Liti-*

gation"]. See also *City of Chicago v. Beretta U.S.A. Corp.*, No. 1-00-3541, 2002 WL 31455180 (Ill. App. Ct. Nov. 4, 2002). And because multiple sales and trace data disclose patterns of illegal firearms trafficking, disclosure of unredacted data may well reveal that firearms manufacturers, wholesalers, and dealers have engaged in marketing practices that unreasonably facilitate firearms crime. Nationwide data is of particular significance because it reflects the scope of the notice that the industry receives through trace requests about the recovery of firearms by the authorities. The local data does not reflect the actual rate at which manufacturers, wholesalers, and dealers are given notice through trace requests that firearms they have marketed have been used in relation to crimes somewhere in the country; local data provides only a fraction of the patterns found in the national data. ATF itself acknowledges that the pattern reflected in nationwide data shows that guns sold through only a tiny proportion of dealers constitute a majority of those recovered in relation to crimes, suggesting that trace requests, at a minimum, place the industry on notice that a small share of scofflaw dealers may well be supplying the lion's share of guns to the criminal market. See *Crime Gun Trace Reports*, *supra* at 46-47; *Commerce in Firearms*, *supra* at 22-25.[18] Accordingly, disclosure and thorough analysis of this data may well aid local authorities in obtaining legal remedies against those who unreasonably facilitate firearms crime, thereby advancing local law enforcement efforts and achieving one of ATF's critical missions.

[18] For descriptions of how multiple sales and trace data may assist local governments in civil litigation, see, *e.g.*, Culhane & Eggen, *supra* at 315-17; Daniel L. Feldman, *Not Quite High Noon for Gunmakers, But It's Coming: Why* Hamilton *Still Means Negligence Liability in their Future*, 67 Brook. L. Rev. 293, 301-04 (2001); Kairys, *supra* at 1166-68; Annie Tai Kao, Note, *A More Powerful Plaintiff: State Public Nuisance Suits Against the Gun Industry*, 70 Geo. Wash. L. Rev. 212, 216-17 (2002); Note, *The Paths of Civil Litigation*, *supra* at 1175-78.

Moreover, FOIA favors disclosure of information that can help local authorities combat firearms crime regardless of whether it also sheds light on ATF's discharge of its own statutory responsibilities. When Congress amended FOIA in 1996, it specifically declared that the statute's purpose was "to establish and enable enforcement of the right of any person to obtain access to the records of [federal] agencies, subject to statutory exemptions, for *any public or private purpose*." Pub. L. No. 104-231, § 2(a)(1), 110 Stat. 3049 (1996) (emphasis supplied). In light of this congressional declaration of policy, it is surely untenable for ATF to argue that the interest of local governments in enhancing their efforts to fight firearms crime through both criminal and civil litigation is not cognizable under FOIA.[19]

Finally, the public interest served by disclosure here is, in reality, far broader than either the public's interest in scrutinizing ATF's performance or in seeing that local governments obtain information that may help them confront firearms crime. Disclosure of unredacted multiple sales data may disclose that multiple purchases so often lead to firearms crime that they warrant greater federal regulation. And disclosure of unredacted trace data may disclose such significant patterns of firearms trafficking, by which guns are funneled to criminals, that additional federal regulation, or a greater commitment of resources to enforcement of existing laws, may appear warranted.[20] Disclosure may thus enable

[19] A number of commentators have taken the view that the 1996 amendments repudiate the reading of FOIA's purposes advanced by ATF. See, *e.g.*, Martin E. Halstuk & Charles N. Davis, *The Public Interest Be Damned: Lower Court Treatment of the* Reporters Committee *"Central Purpose" Reformulation*, 54 Admin. L. Rev. 983 (2002); Charles J. Wichmann III, Note, *Ridding FOIA of Those "Unanticipated Consequences": Repaving a Necessary Road to Freedom*, 47 Duke L.J. 1213 (1998).

[20] For example, even the limited data available at present provides some evidence that greater restrictions on multiple handgun purchases

the public to better evaluate whether Congress itself has enacted sufficient restrictions on commerce in firearms.

There is, moreover, no reason to believe that the public interest in better assessing the adequacy of existing regulatory legislation is beyond the ken of FOIA. The language of Exemption 7(C) is open-ended, asking only if an invasion of privacy is "unwarranted." Nor has this Court construed the Act's policy favoring disclosure in as narrow a fashion as ATF now urges. In *Reporters Committee*, for example, the case on which ATF primarily relies for its claim that FOIA is concerned only with how agencies function (see Pet. Br. 28), the Court actually stated the statutory policy in far broader terms, explaining that FOIA "focuses on the citizens' right to be informed about 'what their government is up to.'" 489 U.S. at 773. In *Department of Defense*, the Court reiterated that FOIA favors disclosure of information that "would serve the 'core purpose of the FOIA,' which is 'contribut[ing] significantly to public understanding of the operations or activities of the government.'" 510 U.S. at 495 (quoting *Reporters Committee*, 489 U.S. at 775 (brackets in original)). And this Court has frequently reiterated its observation in *Robbins Tire* that "[t]he basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." 437 U.S. at 242. Accord, *e.g.*, *John Doe Agency*, 493 U.S. at 152; *United States Department of Justice v. Tax Analysts*, 492 U.S. 136, 142 (1989); *FBI v. Abrahamson*, 456 U.S. 615, 621 (1982). Disclosure of unredacted data serves these policies by enabling the public to evaluate whether its elected representatives have adequately protected their safety.

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reduce firearms crime. See Douglas S. Weil & Rebecca C. Knox, *Effects of Limiting Handgun Purchases on Interstate Transfer of Firearms*, 275 JAMA 1759 (1996).

For all these reasons, the district court did not clearly err when it found that disclosure advances important public interests. See Pet. App. 24a-25a. And in light of the minimal privacy interests at stake here, disclosure is "warranted" within the meaning of Exemption 7(C).

ATF asks this Court, before requiring release of names and addresses of private individuals, to insist on "some especially weighty public interest" (Pet. Br. 32) and, ultimately, "an overriding public interest comparable to the need to address factually supported claims of government illegality." *Id.* at 33-34. Nothing in the text of Exemption 7(C), however, suggests that it categorically exempts disclosure of names and addresses absent some extraordinary showing. Nor does such an approach make sense. When, as here, the privacy interests at stake are marginal, and the interests favoring disclosure are as weighty as the public's interest in determining whether the federal government is adequately protecting its safety, there is no reason to believe that disclosure is "warranted" within the meaning of Exemption 7(C) only if it is likely to disclose illegal government conduct. Surely when information that bears on public safety is at stake, disclosure should readily be deemed "warranted" under Exemption 7(C).

II. THE TRACE DATABASE IS NOT EXEMPT FROM DISCLOSURE UNDER FOIA EXEMPTION 7(A).

ATF does not claim that disclosure of the identities of the firearms licensees that manufactured, imported, or sold traced firearms would work an unwarranted invasion of privacy. Instead, for this information, and much of the rest of the trace database, ATF relies exclusively on FOIA's law enforcement exemption. That exemption applies only when release of information "could reasonably be expected to interfere with enforcement proceedings." 5 U.S.C. § 552(b)(7)(A) (2000). Under Exemption 7(A), ATF withholds the entire trace database for one year and the data elements most important

for analytical purposes for five years; this includes information identifying the law enforcement agency requesting the trace; identifying the firearm's serial number if it was sold in a multiple sale; identifying the licensee that imported, manufactured, or sold the firearm; the date of the firearm's sale at retail; the identity of the purchaser; the location where the firearm was recovered by the authorities; and the identity of its possessor at the time of recovery and the possessor's known associates at that time. See J.A. 35 n.3, 36 n.4, 39 n.5, 40 n.6, 41 n.7, 45 n.9.[21]

What is extraordinary about ATF's withholding policy is that ATF does not know much about the sensitivity of trace results that it shields under Exemption 7(A). ATF acknowledges that it does not ask the law enforcement agency requesting a trace whether the information it has requested might be sensitive or, if disclosed, might impede its investigation. See Pet. Br. 9. Nor does ATF track the progress of investigations. See *id.* at 11. Indeed, it does not even know if the trace data it withholds relates to open investigations; the best ATF can do is to assert that "there is no doubt that many of the over 1.2 million trace results . . . relate to open investigations." *Id.* at 10 (quoting J.A. 25).

Instead of developing a withholding policy that identifies which traces are likely to contain sensitive information, ATF simply presumes that all trace information is sensitive for one year to "allow[] law enforcement personnel sufficient time to complete the trace process of identifying purchasers and possessors of the firearm after it leaves the [dealer]'s distribution chain." Pet. Br. 8. And it presumes that the most important data elements are sensitive for five years "because

[21] ATF claims that only "[n]ine of the 300-plus data elements in the Trace database are withheld for five years pursuant to Exemption 7(A)." Pet. Br. 8. In fact, a review of the statements in the record that we cite above makes clear that ATF withholds 39 discrete data elements for five years under Exemption 7(A).

their release, combined with the other . . . data that ATF currently releases, would enable members of the general public to trace firearms used in crimes and interfere with law enforcement investigations." *Id.* at 9 (quoting J.A. 34). These presumptions, however, are unwarranted, as the district court found. ATF's policy withholds a vast amount of information relating to investigations that may well be closed and that, in any case, are not likely to be disrupted by disclosure. Even more important, the trace information at issue is not sensitive in any meaningful sense—trace results reveal virtually nothing that the subjects of an investigation are not already likely to know.

A. A Withholding Policy Cannot Be Based On Unrealistic Presumptions About The Sensitivity Of Withheld Information.

To invoke Exemption 7(A), an agency need not demonstrate that each requested document, if disclosed, would be likely to interfere with an ongoing or anticipated investigation. Instead, it can identify categories of documents that, if disclosed, would be likely to prejudice investigations, such as witness statements in an investigation that remains open. See *Robbins Tire*, 437 U.S. at 236-42. ATF urges the Court to take "such a categorical approach . . . in this case." Pet. Br. 37. But FOIA does not permit an agency to indulge in categorical withholding of documents based on unrealistic presumptions at war with common sense. This Court's decision in *Landano* settled that point.

In *Landano*, the FBI relied on FOIA's Exemption 7(D) for information that if released "'could reasonably be expected to disclose' the identity of, or information provided by, a 'confidential source.'" 508 U.S. at 167 (quoting 5 U.S.C. § 552(b)(7)(D) (1988)). The FBI argued for a categorical rule that "*all* FBI sources should be presumed confidential; the presumption could be overcome only with specific evidence that a particular source had no interest in confidentiality." *Id.*

at 174 (emphasis in original). The Court rejected that submission, explaining that "the proposed rule is not so much categorical as universal . . . ." *Id.* at 175. The Court noted that the FBI's rule would "presume that virtually every source is confidential: the paid informant who infiltrates an underworld organization; the eyewitness to a violent crime; the telephone company that releases phone records; the state agency that furnishes an address." *Ibid.* In reality, however, FBI sources "can range from the extremely sensitive to the routine." *Id.* at 176. The Court accordingly rejected the FBI's categorical presumption: "Although we recognize that confidentiality often will be important to the FBI's investigative efforts, we cannot say that the Government's sweeping presumption comports with 'common sense and probability.'" *Id.* at 175 (quoting *Basic Inc. v. Levinson*, 485 U.S. 224, 246 (1988)). The same is true of the categorical rule that ATF advances here.

B. The District Court Was Not Obligated To Credit ATF's Evidentiary Submission On The Sensitivity Of Trace Data.

The realities of firearms tracing demonstrate that the presumptions that form the basis for ATF's categorical withholding policies are inappropriate. Firearms cannot be traced until they have been recovered by the authorities—typically they are seized during a search of a suspect or arrestee—and that fact alone tells both the individual from whom the weapon was taken and his associates present for the recovery that an investigation is underway. Indeed, ATF acknowledges that some 70% of all traces identify the individual who possessed the firearm at the time the authorities recovered it. See Pet. Br. 41. Thus, in most cases, the persons from whom the firearm was recovered know full well that it has been seized by the authorities. And it follows that, in most cases, disclosure of trace results under FOIA will not alert the subjects to the fact that an investigation has

begun; that fact will be evident from the moment that the firearm is seized by the authorities. Moreover, the tracing process itself further compromises confidentiality because it requires that firearms manufacturers, wholesalers, and retailers be contacted and told that a trace has been requested. The trace request therefore alerts these entities that an investigation is underway and enables them to tip off the target—or the media—if they are inclined to do so. Indeed, the licensees contacted in the tracing process may themselves be investigative targets, or may be sympathetic to targets that can, of course, include their own customers.

Nor does trace data reveal any of the sensitive details of an investigation. As we explain above, trace data does not identify any prospective witnesses; it identifies only the person from whom the firearm was recovered and his associates present at the time. The identities of those persons, of course, are not confidential, but instead are known to everyone present at the time of recovery and anyone else those persons may tell. Thus, trace results are unlikely to tell subjects of an investigation much that they do not already know. And when the information at issue is likely to already be known to the subjects of an investigation, a claim to Exemption 7(A) is particularly weak. See, *e.g.*, *Campbell v. HHS*, 682 F.2d 256, 265 (D.C. Cir. 1982).

ATF's witness Benton speculated that disclosure of trace data will alert suspects to the existence of an investigation and provide them with an opportunity to obstruct it. J.A. 25-29. And ATF hinges its claim to the 7(A) Exemption on this assertion. See Pet. Br. 38, 40-46. But the district court was not obligated to credit Benton's testimony. Nunziato, a former ATF agent with credentials at least as impressive as Benton's, as well as law enforcement officials from Chicago, Camden County, Detroit, and St. Louis, all testified that the trace database contains primarily nonsensitive data the disclosure of which will not compromise an investigation.

J.A. 60-61, 65-66, 68-69, 84-92, 110. Nunziato identified, as an example of this general point, an investigation of an arms dealer who sold more than 600 guns used in crimes between 1989 and 1998 that was not compromised by disclosure in FOIA data releases of the trace data on these guns. J.A. 84-85. Nunziato also explained that disclosure of the requested data would not reveal any of ATF's methods of analyzing that data or targeting subjects for investigation. J.A. 83-84. He added that trace data is generally non-sensitive because tracing alerts dealers to the existence of an investigation, and that when a trace is necessary in a sensitive investigation, the trace is either specially shielded or flagged with a special code for data Chicago has not requested. J.A. 88-90, 215-19. In the face of this evidence, ATF's assertion that its ability to detect patterns of illegal gun trafficking "would self-evidently be impaired" if the "investigative resource" of the trace database were disclosed (Pet. Br. 44) does not withstand scrutiny.

In any event, even Benton did not claim that trace data is likely to contain sensitive information for even one year, much less five. Benton did not claim that ATF has performed any type of study that demonstrates that investigations involving traces are likely to be ongoing for at least five years, or even one; the five-year period may relate to one potentially applicable statute of limitations (J.A. 34), but nothing in the record demonstrates that the withholding periods selected by ATF are based on the realities of the investigative process.

In fact, the only category of trace data identified in the record as likely to be sensitive is the data that is specially coded or shielded, and that Chicago did not request. J.A. 89-90, 212-15.[22] That fact alone undermines much of

[22] ATF advises that these codes are used in less than one percent of all traces (see Pet. Br. 35 n.18), but it does not claim that it has performed any analysis indicating that other types of traces generally contain

Benton's testimony; three of the nine hypothetical scenarios he offered to show the dangers of releasing the withheld data involved investigations of corrupt dealers (J.A. 42-44), and as Nunziato explained, when this kind of investigation is underway, it is likely to be specially coded or shielded and therefore outside of the scope of Chicago's FOIA request.

ATF claims that disclosure of trace data poses special risks because traces frequently are "related to homicides and other violent crimes . . . ." Pet. Br. 35 n.18. It adds that investigations involving traces pose particularly great dangers to potential witnesses because the subjects of the investigation have possessed firearms. See *id.* at 38. In fact, the trace of a firearm used in a violent crime is especially unlikely to be sensitive—when someone is shot or killed, the offender will almost certainly presume that an investigation is underway and will not need a FOIA disclosure to alert him to that possibility. And if suspects whose firearms have been seized are willing to intimidate witnesses or otherwise obstruct an investigation, there is no reason to believe that they will wait until they obtain the results of a FOIA request before acting on that impulse. As we explain above, the existence of an investigation is disclosed as soon as investigators seize a firearm from a suspect—the firearm's possessor and his associates present at the scene, as well as others who see the seizure or later learn about it, will know that an investigation is underway without any need to review FOIA disclosures. Whatever risks these individuals pose surely do not come from the release of information under FOIA.

sensitive data. ATF does assert that "nothing in the record suggests that the 'do not contact' traces as a group are more sensitive from a public disclosure perspective than other firearm traces" (*ibid.*), but this assertion is belied by Nunziato's testimony. He explained that while specially coded or shielded traces are sensitive, other traces generally are not. J.A. 84, 88-90, 215-19.

ATF offers some particularized claims about the disclosure of trace data. First, ATF repeats Benton's speculation that someone who has abandoned a firearm might learn from a FOIA disclosure that the authorities have recovered it, and only then attempt to obstruct the investigation. See Pet. Br. 41. This scenario is, at the outset, wildly implausible, since anyone who abandons a firearm is necessarily aware that the authorities may recover it, and if he is of a mind to intimidate witnesses or obstruct an investigation, he is unlikely to wait to do so until after a FOIA disclosure has been made, when it may already be too late to conceal evidence, reach witnesses, or elude the authorities, especially given the ordinary delays in processing FOIA requests. And even Benton did not provide any basis for believing that this scenario occurs with any frequency at all, much less with sufficient frequency to justify withholding 1.5 million traces for substantial periods of time, especially when some 70% of all traced firearms, by ATF's own account, were recovered from an identifiable individual rather than abandoned.

Second, ATF asserts that even when the person from whom a firearm was seized is aware that an investigation is underway, there is a danger that others, "(such as a higher-level member of a criminal syndicate) may be unaware that authorities have obtained the weapon and that an investigation has commenced." Pet. Br. 42. It adds that a FOIA disclosure may alert the head of a criminal organization to the identities of the associates present at the scene or to the identity of the retail purchaser of the seized firearm. See *id.* at 43. This claim fails both in terms of the evidence and common sense. Again, nothing in the record supports a claim that members of a criminal organization are frequently unaware that one of their colleagues has been arrested. In fact, the Chicago Police Department informs us that law enforcement agencies presume that members of a criminal organization quickly become aware of an arrest of one of the organization's members. And although trace information discloses the

identity of the possessor and his associates present at the time of recovery and the retail purchaser, the requesting law enforcement agency will obtain that information from ATF long before trace results are disclosed under FOIA, and therefore will have had ample opportunity to act on it before it is disclosed. Indeed, in his testimony, Benton offered no explanation for how disclosure of these highly limited facts under FOIA is likely to obstruct an investigation.[23]

Third, ATF relies on Benton's speculation that FOIA disclosures will alert a suspect that an individual to whom he has been selling firearms is actually an undercover law enforcement operative. See Pet. Br. 42-43. But as Nunziato's testimony makes clear, a trace is highly unlikely in these circumstances, not only because the undercover operative knows who sold him the firearm and needs no trace to learn that information, but because the undercover operation would be jeopardized if the firearm were traced. After all, the tracing process itself, without regard to any subsequent FOIA disclosure, alerts the dealer, and anyone the dealer may choose to tell, that an investigation is underway and that a particular firearm the dealer sold is now in the hands of the authorities as part of a criminal investigation. Accordingly, if a trace were necessary for some reason during the course of an undercover operation, this is precisely the type of circumstance in which the trace would most likely be shielded

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[23] Exemption 7(A) is not applicable merely because requested information will tell the subject of an investigation something he does not already know without showing that the disclosure is likely to interfere with the investigation. See, *e.g.*, *North v. Walsh*, 881 F.2d 1088, 1097-1100 (D.C. Cir. 1989). Indeed, in *Crooker v. BATF*, 789 F.2d 64 (D.C. Cir. 1986), on which ATF relies, the court held that even an uncontroverted affidavit failed to discharge the agency's burden under FOIA because it merely recited that the requested records pertained to an ongoing investigation and did not explain how their release was likely to interfere with the investigation. See *id.* at 65-67.

or coded to protect a sensitive investigation. J.A. 90-91. Nothing in Benton's testimony controverts this point, amply supported by Nunziato's testimony and common sense.

Fourth, ATF supports Benton's claim that disclosure of trace data will encourage the news media to contact suspects and witnesses. See Pet. Br. 43-44. Of course, the news media already does just that in high profile matters. Indeed, in the one concrete example provided by Benton, the shootings at Columbine High School, Benton acknowledged that the media were able to interview the individuals who had sold the firearms later used in the crime even absent a FOIA disclosure, evidently as the result of a law enforcement leak of information. J.A. 33. And Benton could identify no harm to the investigation as a result of this disclosure. Nor did Benton claim that data is disclosed under FOIA so quickly that the media or others will be able to contact witnesses before the authorities can reach them.

Fifth, ATF claims that disclosure of the trace data will enable wrongdoers to learn of the methods ATF uses to analyze that data. See Pet. Br. 44-45. But Chicago has not requested any information that could disclose ATF's analytical methods. J.A. 83-85.[24]

[24] Again, the one concrete example provided by Benton was undermined. Benton asserted that ATF's linking of gun trafficking conspiracies in Florida and Ohio could have been foiled if the traffickers had access to the names of dealers and purchasers. J.A. 26; see Pet. Br. 44. But Nunziato addressed this very investigation, testifying that while he was in charge of ATF's National Tracing Center he was personally instrumental in discovering the link between the Florida and Ohio traffickers, but he "us[ed] information and techniques not available to the general public." J.A. 87. He further testified that at that time "[t]he trace information we used in our analysis was available to the public, yet no one knew that we were conducting this investigation of these companies, and the investigation and prosecution were successful." J.A. 87-88.

Finally, ATF expresses concern based on the volume of the requested records. See Pet. Br. 45. The fact that an agency has chosen to shield a particularly large volume of data from disclosure through the use of an extravagant presumption, however, is hardly an argument against disclosure. In a related vein, ATF claims that disclosure of trace data will deter law enforcement agencies from requesting firearms traces. See *id.* at 46. ATF can readily solve this problem simply by bringing its withholding policies into compliance with FOIA. As we explain above, at present ATF makes no effort to limit withholding to those traces likely to be sensitive; information is withheld under Exemption 7(A) even though no one actually conducting the investigation has ever expressed any concern about disclosure. Under a proper withholding policy, ATF would permit the agency requesting the trace, if it has a legitimate concern about disclosure and if the trace is not itself specially coded or shielded, to indicate as part of the request that the trace is sensitive. Those trace results could then properly be withheld. A tailored policy along these lines, no longer based on an unfounded presumption that all traces are sensitive, will readily pass muster under Exemption 7(A).[25]

[25] The Solicitor General states that ATF has informed him that more than 40 police departments have signed memoranda of understanding with ATF requesting that "the law enforcement sensitive firearms trace information generated pursuant to the Agreement shall not be disclosed to a third party without the consent of both parties to the agreement." Pet. Br. 46. See also FOP Br. 16-17. The Chicago Police Department informs us that it is ATF itself that has solicited these agreements in return for offering its cooperation to local authorities. As far as we can tell, these agreements reflect no spontaneous expression of concern by other law enforcement agencies—none of which has filed a brief in support of ATF either here or in the court of appeals—but only ATF's effort to pressure local police departments to support its litigation strategy.

C. The District Court Was Not Obligated To Defer To ATF's Views On The Effect of Disclosure.

ATF does not argue that any of the district court's findings on Exemption 7(A) are clearly erroneous. And they were not. As we explain above, there was ample support in the record for the finding that rejects ATF's testimony as unpersuasive (see Pet. App. 26a-27a), a finding that was subsequently upheld by the court of appeals (see *id.* at 7a-10a, 18a). ATF nevertheless argues that the district court was obligated to credit its testimony. See Pet. Br. 48-49.[26] But the claim that the district court was required to credit an agency's witnesses, no matter how implausible or how sharply controverted by other evidence, is in effect an argument that the district court was obligated to defer to the agency's judgment in FOIA litigation. And that position is indefensible. As we explain above, under FOIA the agency bears the burden of justifying an exemption, not merely a burden of coming forward with evidence, and it is up to the district court to evaluate the agency's showing de novo, rather than affording it only limited or deferential review. For just this reason, an agency's plea for deference to the opinion testimony of its witnesses is inconsistent with FOIA itself, which rejects any

[26] ATF also complains that the court of appeals effectively required it to prove the impossible, by showing that data it has never released have been used to obstruct investigations. See ATF Br. at 47-48. In fact, the record shows that ATF has released trace data on numerous occasions in the past to advocacy groups, journalists, and even purchasers. See J.A. 76-79, 84-88, 93-101, 107-08; R. 25, Ex. G. Yet ATF could neither show that these prior releases had harmed any investigation, nor explain why they were any less likely than the disclosure sought here to produce the results that ATF claims to fear. In any event, the court of appeals' holding ultimately rests not on ATF's failure to show past interference with investigations, but on its conclusion that ATF had not provided a reasonable basis to support its speculative fears about the effect of disclosure. See Pet. App. 10a, 18a.

notion of judicial deference to an agency's views on disclosure policy: "Unlike the review of other agency action that must be upheld if supported by substantial evidence and not arbitrary or capricious, the FOIA expressly places the 'burden on the agency to sustain its action' and directs the district courts to 'determine the matter de novo.'" *Reporters Committee*, 489 U.S. at 755 (quoting 5 U.S.C. § 552(a)(4)(B) (1988)).[27]

Moreover, the argument for deference to agency expertise is especially weak in a case such as this one, where the agency does not actually conduct the investigations that it claims would be impeded by disclosure. In fact, 97% of all traces are performed at the request of agencies other than ATF. See R. 34, Ex. F ¶ 9. Surely it is not asking too much to expect ATF to support a claim to Exemption 7(A) with at least some testimony from law enforcement officials who are actually responsible for the bulk of the investigations at issue.

III. EVEN IF INFORMATION DISCLOSING INDIVIDUAL NAMES, ADDRESSES, OR FIREARMS IS EXEMPT FROM DISCLOSURE, ATF MUST PRODUCE NONEXEMPT INFORMATION ABOUT THESE DATA ELEMENTS THROUGH ENCRYPTED REDACTION.

The district court found that even if individual names, addresses, or firearms were exempt from disclosure under FOIA, that information was reasonably segregable within the meaning of FOIA because it can readily be purged through

[27] The circuits are in agreement that a district court is not obligated to credit an agency's witnesses when their testimony is controverted by other evidence in the record. See, *e.g.*, *Silets v. United States Department of Justice*, 945 F.2d 227, 231 (7th Cir. 1991) (en banc), cert. denied, 505 U.S. 1204 (1992); *American Friends Service Committee v. Department of Defense*, 831 F.2d 441, 444 (3d Cir. 1987); *Military Audit Project v. Casey*, 656 F.2d 724, 738 (D.C. Cir. 1981).

a redaction procedure, with information linking specific although anonymous names, addresses, or weapons to particular traces then disclosed through the use of computerized encryption. See Pet. App. 27a-30a.[28] Because the court of appeals found that none of the requested information was exempt from disclosure, it did not reach this question. See *id.* at 15a-16a. Nevertheless, if this Court finds that some of the information at issue is exempt from disclosure, the question whether a redacted form of that same information must be produced through computer encryption would be properly before the Court. That question is fairly included in the questions presented by ATF's petition for certiorari and, accordingly, may be considered under this Court's Rule 14.1(a).[29]

[28] Although at the outset of its discussion of redaction the district court phrased its ruling in terms of the law enforcement exemption (see Pet. App. 27a), the court's ultimate ruling was in broader terms, stating that "even if the information requested were to fall within one of the FOIA exemptions, the identifying information is entirely segregable from other valuable information, and ATF would have a duty to provide a redacted form of the information." *Id.* at 30a. ATF itself understands the segregability issue before the district court to apply to all of its claims to exemptions. See Pet. Br. 13 n.10 (defining the issue before the district court as "whether, if some but not all of the requested information was ultimately held to be exempt from compelled disclosure, the government could feasiblely segregate and withhold the exempt information, while releasing any data that were found to be non-exempt.").

[29] ATF's petition presents questions about whether information identifying individual names, addresses, and weapons is exempt, but as the district court's redaction ruling recognizes, even if ATF is correct, at least some information relating to these categories can still be released through encryption. Moreover, ATF itself argues that when evaluating whether a disclosure is "warranted" under Exemption 7(C), the Court should consider whether there is an "alternative means" to make data available without unnecessarily compromising privacy interests. See Pet. Br. 30 n.14.

The Court should exercise its discretion to review the district court's redaction ruling. The record is fully developed on this issue, and the interests of justice favor resolving it now, rather than leaving it for further proceedings on remand, with the potential for that question to return to this Court later. We say this because there is an enormous volume of firearms litigation pending in state courts throughout the country, and the litigants in those cases are in need of an authoritative ruling on what trace and multiple sales data ATF must produce.[30] Indeed, because multiple sales and trace data is so important to these cases, they cannot be tried fairly until the question whether ATF must produce this probative evidence is resolved.[31] Surely it is in the interests of justice for this Court to decide at this juncture what information must be produced by ATF, to avoid forcing the litigants in these many cases either to go to trial without access to critical evidence or suffer years of delay before ATF's disclosure obligation is resolved, data is released, and related litigation may then in fairness go forward.

The propriety of redaction is beyond doubt. Even when some requested information is exempt from disclosure under FOIA, the statute provides that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting

[30] Information on the status of the firearms litigation pending around the country is available at www.firearmslitigation.org.

[31] ATF's regulations grant it virtually absolute discretion to decide whether to honor a subpoena issued by a state court. See 27 C.F.R. § 70.803 (2002). Moreover, federal agencies cannot be compelled to produce evidence for a proceeding in a state court except when required by agency regulations. See, *e.g.*, *United States ex rel. Touhy v. Ragen*, 340 U.S. 462, 467-69 (1951). As ATF acknowledges, in one case pending in a federal court, where ATF must respond to subpoenas, it has been compelled to produce trace data under a protective order. See Pet. Br. 7 n.5. Most pending firearms cases, however, could not have been brought in a federal court because they do not involve parties of diverse citizenship. See 28 U.S.C. § 1332 (2000).

such record after deletion of the portions of which are exempt under this subsection." 5 U.S.C. § 552(b) (2000). This provision codifies precedents holding that redaction of those portions of a record that are exempt from disclosure under FOIA and production of the balance is required when practicable. See *Rose*, 425 U.S. at 378-82. Accordingly, this provision "requires agencies and courts to differentiate among the contents of a document rather than to treat it as an indivisible 'record' for FOIA purposes." *Abrahamson*, 456 U.S. at 626. This statutory redaction obligation is not limited to tangible documents and other physical records; FOIA defines the term "record" to "include[] any information that would be an agency record . . . when maintained by an agency in any format, including an electronic format." 5 U.S.C. § 552(f)(2) (2000). Moreover, FOIA requires an agency to produce electronic records in any requested format that imposes no undue burden on the agency: "An agency shall provide the record in any form or format requested . . . if the record is readily reproducible by the agency in that form or format." *Id.* § 552 (a)(3)(B).

Chicago's proposal for redaction through coding or encryption of information that is found to be exempt from disclosure recognized that the analysis of the multiple sales and trace data necessary to assess patterns of firearms trafficking requires a unique identifier for each individual name, address, and firearm in the database. A unique identifier would allow those who receive disclosed data to identify patterns of gun trafficking, including multiple sales to the same individual and the source of a particular weapon used in a crime. See Pet. App. 28a. A system of redaction through coding or encryption prevents disclosure of exempt information, while disclosing the nonexempt fact that certain purchases were made by the same, albeit anonymous, individual, as well as identifying when particular firearms were recovered from certain individuals, again anonymous. See *ibid.*

In the court of appeals, ATF did not doubt that encrypted redaction would produce only "reasonably segregable" information within the meaning of FOIA. Instead, ATF made only one complaint about the district court's ruling; it claimed that encrypted redaction improperly required it to create a new record. But the district court took testimony on this issue from three ATF witnesses and two Chicago witnesses. The City proposed three possible methods of eliminating personal names and addresses while preserving unique identifiers for each individual: "option 1," a series of letters drawn from the name; "option 2," letters from the name along with date of birth and city of birth; "option 3," an encrypted series of random letters. J.A. 80. The district court endorsed encryption, finding that it did not require ATF to create new documents. See Pet. App. 28a-30a. This finding was not clearly erroneous.[32]

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[32] The district court also found that coded redaction would impose no unreasonable burden on ATF. See Pet. App. 29a-30a. ATF did not challenge that finding in the court of appeals, and it is well supported by the record. ATF's own witness, Chambers, conceded that ATF did not consider burdensome any computer programming that took two person-hours or less when processing FOIA requests. See J.A. 123; R. 76-1 at 27. ATF's witness Foreman testified that option 3 would take "a couple hours at the least." See R. 76-1 at 122. Foreman conceded, however, that he had no experience with encryption software, that he was unsure of his estimate, and that the time required could become shorter as he became familiar with the process. See R. 76-1 at 95, 122-23. The City's witness Van Aken, the only witness certified as an expert in computer programming (J.A. 224-32), testified that creating an encrypted identifier (option 3) was a "pretty straightforward query" and would only take seven minutes (J.A. 241). Weighing the evidence, the district court noted that encryption (option 3) would take "anywhere from a few minutes to a few hours" and once it was done could "be stored on a zip disk and easily and cheaply provided to FOIA requesters." Pet. App. 29a-30a. The court concluded that FOIA obligated ATF to provide redacted or encrypted information "where, as here, the information is stored in a database and such encryption is a reasonable and simple means of segregating sensitive information from non-sensitive information." *Id.* at 30a.

The testimony of the City's expert witness, Van Aken, is dispositive on this point. He explained that in encrypted redaction, no new information about individuals or weapons is added to the data, but instead the computer is instructed to produce only limited information about individuals or firearms by "performing a calculation" or a "translation." J.A. 240, 242, 245-46. That does not improperly create a new agency record; it merely produces existing records in encrypted form. While it is true that new instructions must be given to the computer in order to cause it to produce redacted data, adding new codes to the data is no different from instructing a clerk to add black marks to a physical document to obscure some of the information on it. The propriety of hard-copy redaction is well settled. See *Rose*, 425 U.S. at 373-82. The codes produced by encryption are not new agency records; they are merely a way to conceal exempt while producing nonexempt information. If the necessity of giving a computer new instructions directing it to produce only limited information were thought to improperly require the agency to create a new record, then FOIA itself would be a dead letter as applied to electronic data since, as the district court found, new instructions must always be given to a computer before it will produce identifiable data. See Pet. App. 29a; see also J.A. 163-67. Indeed, in crafting the 1996 amendments to FOIA that imposed the obligation on agencies to produce electronic records in even new or different formats when no undue burden would be imposed, Congress recognized that "[c]omputerized records may require the application of codes or some form of programming to retrieve the information." S. Rep. No. 104-272, at 19 (1996). And, because encryption produces the agency's existing records in a different format, it is precisely the kind of production of

electronic records in a new or different format that FOIA obligates an agency to undertake absent an undue burden. See 5 U.S.C. § 552(a)(3)(B) (2000).[33]

In sum, the record shows that the district court rightly decided that encrypted redaction was an appropriate means of shielding exempt information. If the Court finds that information disclosing individual names, addresses, or firearms is exempt from disclosure, it should order redacted versions of this information disclosed by means of the encryption procedure approved by the district court.

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[33] On this point, ATF relied below primarily on *Students Against Genocide v. Department of State*, 257 F.3d 828 (D.C. Cir. 2001), and *Yeager v. DEA*, 678 F.2d 315 (D.C. Cir. 1982). In *Students Against Genocide*, the court declined to order an agency to produce satellite photographs at a resolution different from what the agency itself utilized to mask the capability of the satellites. See 257 F.3d at 857. In that case, however, the requesters sought a different type of photograph than the agency maintained in its records. Here, as the district court found, the information that would be produced through encrypted redaction is already in ATF's database, is information that the agency actually maintains and utilizes, and constitutes a reasonably segregable portion of the database not exempt from disclosure. As for *Yeager*, the court in that case held that the agency was not required to "compact" information in its database; "[t]he court compared the processes and results of 'deleting' and 'compacting' and determined that 'compacting' involved a different and potentially greater burden than deletion." 678 F.2d at 324. Thus *Yeager* rests on the burden that the method of redaction would place on the agency, a problem not present here. Moreover, in *Yeager*, as in *Students Against Genocide*, all the information in the database was exempt from disclosure, and the issue was whether the agency had to convert it to a new, nonexempt format. See *id.* at 322-23.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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February 5, 2003